UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

YETI Coolers, LLC, **Plaintiff,** **v.** **Kuer Outdoors, LLC,** **Defendant.**	**Case No. 1:16-cv-00631-RP**

PLAINTIFF YETI COOLERS, LLC'S MOTION FOR DEFAULT JUDGMENT

Plaintiff YETI Coolers, LLC ("YETI") respectfully moves for Judgment by Default against Defendant Kuer Outdoors, LLC ("Kuer" or "Defendant").

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I. INTRODUCTION

This Court should enter a final judgment by default against Kuer pursuant to Rule 55(b) of the Federal Rules of Civil Procedure because Kuer has not answered or otherwise responded to YETI's Complaint, has not appeared in this action, apparently has no intention of participating in the lawsuit, and because the Clerk of this Court has entered a default against Kuer pursuant to Rule 55(a) of the Federal Rules of Civil Procedure. As part of the final judgment, YETI is entitled to the relief afforded under the federal Lanham Act, the Texas Business and Commercial Code, the federal Patent Act, the Federal Rules, and the Texas Rules of Civil Procedure, including an injunction to Kuer's acts of infringement, dilution, and unfair competition. The detailed grounds supporting YETI's request are set forth below.

II. THE RELEVANT FACTS

A. THE FACTUAL ALLEGATIONS OF YETI'S COMPLAINT ARE ACCEPTED AS TRUE BECAUSE KUER HAS FAILED TO ANSWER AND IS IN DEFAULT

YETI filed its Complaint on May 27, 2016. (ECF No. 1 ("Comp."); *see also* Declaration of J. Pieter van Es ("van Es Decl."), filed concurrently as Exhibit A, at ¶ 2, Ex. 1). On June 30, 2016, Kuer was served with a summons and a copy of the Complaint by personal service onto an authorized person of its registered agent. (ECF No. 8; *see also* van Es Decl., at ¶ 3, Ex. 2).

Kuer's answer was originally due on July 21, 2016, but Kuer failed to file an answer or any other responsive pleading, or otherwise appear in this action. *See* FED. R. CIV. P. 6, 12(a)(l)(A); (van Es Decl., at ¶ 4). The Court therefore ordered that YETI move for default by October 17, 2016 and thereafter move for default judgment. (ECF No. 9). (*See also* van Es Decl., at ¶ 6).

In addition to service on Kuer's registered agent, YETI has made extensive and repeated attempts to communicate with Kuer regarding the lawsuit, including attempted communications to Kuer by courier, U.S. mail, email and online to multiple Kuer physical, email and website addresses, at least on May 27, 2016, June 7, 2016, June 20, 2016, August 2, 2016, October 15, 2016, October 17, 2016 and October 18, 2016. (*see* van Es Decl., at ¶¶ 5-7, Exs. 3-12 and 14-15).[1] The only substantive response YETI has received is a single email sent on July 28, 2016 from the email address kuercoolers@gmail.com, where Kuer did not indicate any intention to participate or defend in this lawsuit. (*Id.* at ¶ 5, Ex. 9). YETI responded by return email to Kuer on August 2, 2016, and informed Kuer that YETI would like to discuss resolving this matter amicably, but YETI never received a response to its August 2 email. (*Id.*). As illustrated by this correspondence, even with repeated efforts by YETI, Kuer has failed to substantively discuss this lawsuit.

On October 15, 2016, YETI informed Kuer that it intended to comply with the Court's Order by requesting default by October 17, 2016, and by further requesting default judgment after entry of default, if the Parties were unable to settle the matter. (van Es Decl., at ¶ 6, Ex. 10). Kuer did not respond, appear, answer, or file any other responsive pleading. (*Id.* at ¶¶ 4-7).

Accordingly, on October 17, 2016, YETI requested the Clerk's entry of default pursuant to Rule 55(a) of the Federal Rules of Civil Procedure. (ECF No. 10). (*See also* van Es Decl., at ¶ 7, Ex. 11). On October 17, 2016, YETI sent a copy of these materials to Kuer's registered agent and on October 18, 2016, YETI emailed these materials to the Kuer email address. (van Es Decl., at ¶ 7, Exs. 12, 15). Later on October 18, 2016, the Clerk of this Court entered default pursuant to Rule 55(a) of the Federal Rules of Civil Procedure. (ECF No. 11). (*See also* van Es Decl., at ¶ 7, Ex. 13). YETI subsequently informed Kuer on October 18, 2016 by email that default had been entered and provided a copy of the Clerk's entry of default, and mailed the Clerk's entry of

[1] Exhibits 6 and 7 reflect YETI's attempts to communicate via a submission to the Kuer website.

Default to Kuer's registered agent. (van Es Decl., at ¶ 7, Exs. 14-15). YETI further informed Kuer via email that YETI intended to move for default judgment, but remained willing to discuss resolution of the lawsuit with Kuer. (*Id.* at ¶ 7, Ex. 14). As of the date of this filing, Kuer has not responded, nor has it appeared, answered, or filed any other responsive pleading. (*Id.* at ¶ 7). Indeed, since July 28, 2016, Kuer has not communicated with YETI, and is not otherwise defending this lawsuit. (*Id.* at ¶¶ 4-7).

The facts alleged in the YETI's Complaint are taken as true, and Kuer is deemed to have admitted liability and the facts of the Complaint, upon the Clerk's Entry of Default. *See, e.g.*, *In re Dierschke*, 975 F.2d 181, 185 (5th Cir. 1992) ("It is universally understood that a default operates as a deemed admission of liability."); *Christus Health Care Sys., Inc. v. Am. Consultants RX, Inc.*, No. 12-1221, 2014 WL 1092096, at *3 (W.D. Tex. Mar. 18, 2014) ("By virtue of the Defendants' default, they have admitted the allegations in the complaint."); *J&J Sports Prods. v. El Pescador Mexican Seafood, Inc.*, No. 10-419, 2010 U.S. Dist. LEXIS 127940, at * 4 (E.D. Tex. Oct. 27, 2010) ("Defendants are deemed to have admitted by default all the factual allegations in Plaintiff's Complaint."); *Pathway Senior Living LLC v. Pathways Senior Living LLC*, No. 15-2607, 2016 WL 1059536, at *2 (N.D. Tex. Mar. 17, 2016) (when "default has been entered by the Clerk pursuant to Federal Rule of Civil Procedure 55(a), the factual allegations of the complaint are taken as true." (citing 10A Wright, et al., FEDERAL PRACTICE & PROCEDURE § 2688 (3d ed.)). *See also Twist & Shout Music v. Longneck Xpress, N.P.*, 441 F.Supp.2d 782, 785 (E.D. Tex. 2006) ("[E]ntry of default against Defendant is tantamount to actual success on the merits."). Thus, the allegations from YETI's Complaint (as detailed below) are taken as true and as admitted by Kuer.

B. KUER WILLFULLY VIOLATES YETI'S INTELLECTUAL PROPERTY RIGHTS

YETI has engaged in the development, manufacture, and sale of premium, heavy-duty coolers for nearly ten years. (Comp. at ¶ 7). As a result of YETI's considerable investments and efforts, YETI's Roadie® and Tundra® coolers are designed and built to provide extreme insulating capabilities and exceptional durability, and YETI has invested substantial resources in the design, development, manufacture, and marketing of these coolers. (*Id.* at ¶ 8). YETI has sold more than 400,000 Roadie® and more than 1,000,000 Tundra® coolers throughout the United States. (*Id.*). YETI own patents related to its coolers, including U.S. Patent No. 8,910,819 and U.S. Patent No. 9,187,232 (collectively "the YETI patents"), which have been duly and legally issued, and which are assigned to YETI. (*Id.* at ¶¶ 9-10).

YETI has also engaged in the development, manufacture, and sale of premium, heavy-duty insulated drinkware. (Comp. at ¶ 11). YETI has created unique, distinctive, and non-functional designs to use with YETI's insulated drinkware. (*Id.*). Relevant to this suit, YETI sells certain tumbler insulated drinkware products, the "YETI 30 oz. Rambler™ Tumbler" and the "YETI 20 oz. Rambler™ Tumbler," hereinafter referred to as "the Rambler Tumblers." (*Id.* at ¶ 12). The Rambler Tumblers' designs have distinctive and non-functional features that identify to consumers that the origin of the Rambler Tumblers is YETI. (*Id.* at ¶ 14). As a result of YETI's continuous use of the Rambler Tumblers' designs, YETI's marketing, advertising and sales of the design, and the highly valuable goodwill and substantial secondary meaning acquired as a result, YETI owns trade dress rights in the Rambler Tumblers' designs. (*Id.* at ¶¶ 11-14, 19) (hereafter the "YETI Trade Dress"). What's more, as a result of YETI's substantial use, advertising, and sales of insulated drinkware products bearing the YETI Trade Dress, and the publicity and attention that has been paid to the YETI Trade Dress, the YETI Trade Dress has become famous and has acquired valuable goodwill and substantial secondary meaning in the marketplace, as consumers have come to uniquely associate it as a source identifier of YETI. (*Id.*).

Kuer is a corporation organized under the laws of the State of Delaware with a place of business at 22820 Interstate 45, Building 9M, Spring, TX 77373, that is also involved in the sale of coolers and drinkware. (*Id.* at ¶¶ 2, 20-25, Exs. 3-4).

The facts alleged in YETI's Complaint establish that Kuer, at least, advertised, sold and offered for sale cooler products that infringe the YETI Patents and drinkware products that are "confusingly similar imitations" of the YETI Trade Dress (collectively, the "Infringing Products"). (*Id.* at, *e.g.*, ¶¶ 20-45, *see also* Illustrations 1-4). Defendant's actions with respect to tumblers infringe and dilute YETI's Trade Dress rights, constitute unfair competition and false designation of origin, as well as unjust enrichment, misappropriation, and common law trademark infringement. (*Id.* at ¶¶ 40-91). Finally, all of Defendant's infringements have been willful, as evidenced by the similarity of the Infringing Products when compared to the inventions of the YETI Patents and the designs of the YETI Trade Dress. (*Id.* at, *e.g.*, ¶¶ 20, 29-30, 36-37, 44, 50).

Thus, Kuer's infringements, dilutions, and acts of unfair competition have been intentional and willful. At the same time, Kuer's refusal to meaningfully engage in this litigation undermines YETI's ability to enforce its intellectual property rights. Consequently, Kuer's actions have caused irreparable harm to YETI's intellectual property rights, business, reputation, and goodwill, and as such, YETI has no adequate remedy at law. (*Id.* at, *e.g.*, ¶¶ 20-25, 31-32, 38-39, 43, 50).

III. ARGUMENT

A. THIS COURT SHOULD ENTER A FINAL JUDGMENT BY DEFAULT

YETI is entitled to entry of default judgment because the Kuer is ignoring its obligations to this case and this Court. In determining whether to grant a default judgment under Rule 55(b), the Court considers "(1) whether default judgment is procedurally warranted; (2) whether the complaint sufficiently sets forth facts establishing that it is entitled to relief; and (3) what form of relief, if any, the plaintiff should receive." *Christus Health*, 2014 WL 1092096 at *2. In so doing, the Court further considers: "1) if the default was caused by a good faith mistake or excusable neglect; 2) if there has been substantial prejudice; 3) the harshness of a default; 4) if there are material issues of fact; 5) if grounds for a default judgment are clearly established; and 6) if the court would think it was obligated to set aside the default on the defendant's motion." *Pathway*, 2016 WL 1059536, at *4 (citing *Lindsey v. Prive Corp.,* 161 F.3d 886, 893 (5th Cir. 1998)). Because all of these factors weigh in YETI's favor, the Court should enter default judgment in this case under Rule 55(b) of the Federal Rules of Civil Procedure.[2]

First, default judgment is "procedurally warranted" because Kuer has failed to enter an appearance, file an answer, or "defend against this suit in any manner." *Christus Health*, 2014 WL 1092096 at *3. What's more, the Clerk has now entered default against Kuer. (ECF No. 11). These facts also show that Kuer's failures are not the result of "good faith mistake or excusable neglect" and further show that the Court will not be "obligated to set aside the default." *See, e.g., Pathway*, 2016 WL 1059536, at *4 (finding default judgment was "warranted" because the "default was not caused by a good faith mistake or excusable neglect … and the Court is unlikely to find itself obligated to set aside default" when "on the record before the Court, Defendant deliberately failed to defend this action, despite fair notice").

Indeed, Kuer is clearly aware of the merits and requirements of this action: it even contacted YETI's counsel at one point after YETI's attempts to discuss the lawsuit. (*See* van Es Decl. at ¶ 5, Ex. 9). Put simply, Kuer is *choosing* to disregard this Court, this lawsuit, and YETI's intellectual property rights. Therefore, all of these factors weigh in favor of granting judgment.

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[2] While YETI must also show that Kuer is not a minor, incompetent, or in military service, Kuer is a corporation and therefore cannot fall under these exceptions for imposing default judgment. *See, e.g., John Perez Graphics & Design, LLC v. Green Tree Inv. Grp., Inc.*, No. 12-4194, 2013 WL 1828671, at *2-3 (N.D. Tex. May 1, 2013). (*See also* van Es Decl. at ¶ 12).

Next, the merits of YETI's substantive claims and the sufficiency of the Complaint weigh in favor of default. YETI's Complaint "sufficiently sets forth facts establishing that it is entitled to relief." *See, e.g., Christus Health*, 2014 WL 1092096 at *2, 4-5 (allegations of ownership of protectable mark, and that defendants' use of similar marks caused likelihood of confusion "provides sufficient basis to enter default judgment on [the plaintiff's] claim for trademark infringement" as well as unfair competition claim); *Pathway*, 2016 WL 1059536, at *2-4 (finding default judgment was "warranted" when plaintiff alleged defendant is using terms nearly identical to plaintiff's marks to market nearly identical services, the court also noting the "low threshold" for sufficient allegations in this context, because "default is the product of a defendant's inaction" and the (relatively) more rigorous standards of Rule 12 are not applicable); *The Gillette Co. v. Save and Discount LLC*, No. 15-636, 2016 WL 3745764, at *1-2 (S.D. Ohio July 13, 2016) (granting default judgment when plaintiff identified competitor products and alleged that sales and offers to sell of the products infringed the asserted patents); *Innovative Office Prods., Inc. v. Amazon.com, Inc.*, No. 10-4487, 2012 WL 1466512, at *1-2 (E.D. Pa. April 26, 2012) (same). Here, YETI makes sufficient allegations to establish its trade dress and patent infringement claims, as well as its dilution, misappropriation, and unjust enrichment claims. (*See* Comp. at ¶¶ 7-91).

Relatedly, given that YETI's allegations are "taken as true," Kuer is deemed to have admitted liability and entry of default "is tantamount to actual success on the merits," meaning there are no "material issues of fact" to weigh against default. *See, e.g.*, *In re Dierschke*, 975 F.2d at 185 ("It is universally understood that a default operates as a deemed admission of liability."); *Pathway,* 2016 WL 1059536, at *2; *Twist & Shout*, 441 F.Supp.2d at 785; *Ins. Co. of the W. v. H & G Contractors, Inc.*, No. 10-390, 2011 WL 4738197, at *3 (S.D. Tex. Oct. 5, 2011) ("Defendant has not filed any responsive pleadings, and thus there are no material facts in dispute."); *Innovative Office*, 2012 WL 1466512, at *4 ("the allegation of [patent] infringement … must be taken as true for the purpose of the Motion ... [b]y failing to answer the Complaint, Defendant is deemed to have admitted that he deliberately and willfully infringed the Patents.") (quotations omitted). Therefore, this factor also weighs in favor of default.

Moreover, there is "substantial prejudice" to YETI if default judgment is not entered. Indeed, Kuer's "failure to respond threatens to bring the adversary process to a halt, effectively prejudicing Plaintiff's interests." *Ins. Co. of the W.*, 2011 WL 4738197, at *3 (citing *Lindsey*, 161 F.3d at 893). The inability to address infringement and dilution of YETI's rights due to Kuer's willful ignorance of this case also constitutes substantial prejudice to YETI. *See, e.g., Christus Health*, 2014 WL 1092096, at *9 (harm to plaintiffs' reputation and goodwill flowing from defendants' unauthorized use of trademarks is irreparable).

Finally, the "harshness of a default" does not weigh against a judgment here given that Kuer has had months to participate in this case, and has simply chosen not to. *See Ins. Co. of the W.*, 2011 WL 4738197, at *3 ("Defendant has had ample time to answer, mitigating the harshness of a default judgment."). YETI also only seeks remedies explicitly provided by the Lanham Act, the Texas Business and Commercial Code, the Patent Act and the Federal Rules, which further mitigates any "harshness." *See, e.g., John Perez Graphics & Design, LLC v. Green Tree Inv. Grp., Inc.*, No. 12-4194, 2013 WL 1828671, at *3 (N.D. Tex. May 1, 2013) (noting this factor weighed in favor of default judgment when "[p]laintiff seeks only the relief to which it is entitled under the law").

In sum, this Court should enter a final judgment by default granting YETI the relief described below, pursuant to Rule 55(b) because the Defendant has knowingly declined to participate in this case and the grounds supporting the default judgment are clear. *See*, *e.g.*, *Christus Health*, 2014 WL 1092096, at *9 (granting default judgment in trademark case and entering permanent injunction sought in Complaint).

B. THIS COURT SHOULD GRANT YETI'S REQUESTED RELIEF

Because the factual allegations of YETI's Complaint (ECF No. 1) are accepted as true, it is established that Kuer has willfully violated the YETI Patents and the YETI Trade Dress. Accordingly, final judgment should be entered granting YETI the following relief:

- Judgment declaring that Kuer has (i) infringed U.S. Patent No. 8,910,819 in violation of § 271 of Title 35 in the United States Code; (ii) infringed U.S. Patent No. 9,187,232 in violation of § 271 of Title 35 in the United States Code; (iii) infringed the YETI Trade Dress in violation of § 1125(a) of Title 15 in the United States Code; (iv) engaged in unfair competition and false designation of origin in violation of § 1125(a) of Title 15 in the United States Code; (v) diluted YETI's tumbler trade dress in violation of § 1125(c) of Title 15 in the United States Code; (vi) diluted the YETI Trade Dress in violation of Tex. Bus. & Com. Code § 16.103; (vii) violated YETI's common law rights in the YETI Trade Dress; (viii) engaged in common law unfair competition; (ix) engaged in common law misappropriation; and (x) been unjustly enriched at YETI's expense, and that all of these wrongful activities by Kuer were willful. (*See, e.g.,* Comp. at ¶¶ 7-91, and p. 21);

- A permanent injunction against further infringement of the YETI Patents, and further infringement and dilution of the YETI Trade Dress, and further acts of unfair competition, misappropriation and/or unjust enrichment by Kuer, and each of its agents, employees, servants, attorneys, successors and assigns, and all others in privity or acting in concert with any of them, including at least from selling, offering to sell, distributing, importing, or advertising the Infringing Products, or any other products that use a copy, reproduction, or colorable imitation of the YETI Trade Dress and/or infringe the inventions of the YETI Patents, pursuant to at least 15 U.S.C. § 1116, 35 U.S.C. § 283, TEX. BUS. & COM. CODE §§ 16.103 and 16.104, and Rule 65, FED. R. CIV. P. (*See, e.g.,* Comp. at ¶¶ 32, 39, 45, and p. 22);
- An award of Kuer's profits and YETI's actual damages, based on Kuer's willful infringements and dilutions of the YETI Patents and/or the YETI Trade Dress, in an amount to be determined should YETI be able to enforce the judgment, and enhanced due to Kuer's willful actions, pursuant to at least 15 U.S.C. § 1117, 35 U.S.C. § 284, and TEX. BUS. & COM. CODE §§ 16.103 and 16.104. (*See, e.g.,* Comp. at ¶¶ 30-31, 3-738, 45, 58, 65 and p. 23);
- An assessment of costs, including reasonable attorney fees and expenses, pursuant to at least 15 U.S.C. § 1117, 35 U.S.C. § 285, TEX. BUS. & COM. CODE §§ 16.103 and 16.104, and Rule 54. *See Pathway,* 2016 WL 1059536, at *5 (entering award of attorneys' fees upon grant of default judgment against willful trademark infringer); *Christus Health*, 2014 WL 1092096, at *5-6 (same); *Gillette*, 2016 WL 3745764, at *4 (awarding fees on default due to willful infringement and failure

to appear); FED. R. CIV. P. 54(d) (costs are awarded as a matter of course to the prevailing party unless the court otherwise directs). (*See, e.g.,* Comp. at ¶¶ 45, 51, 58, 65, 71 and p. 23);

- An Order directing Kuer to recall all Infringing Products sold and/or distributed and to turn over to YETI three samples of each Infringing Product. (*See* Comp. at p. 22);
- An Order directing the destruction of (i) all the remaining Infringing Products, including any recalled Infringing Products (other than the samples turned over to YETI as described above), (ii) any other products that use a copy, reproduction, or colorable imitation of the YETI's Trade Dress in Kuer's possession or control, and (iii) all plates, molds, and other means of making the Infringing Products in Kuer's possession, custody, or control, pursuant to at least 15 U.S.C. § 1118. *Pathway,* 2016 WL 1059536, at *5 (awarding destruction of products infringing Plaintiff's trademarks upon default judgment); *Diamond Heads, LLC v. Everingham*, No. 07-462, 2009 WL 1046067, at *1, 10 (M.D. Fla. Apr. 20, 2009) (ordering destruction of products that infringed asserted patents). (*See, e.g.,* Comp. at p. 22); and
- An Order directing Kuer and its believed principal, Antonio F. Guerrero, to provide post-judgment discovery to YETI to aid in enforcement the Court's judgment, pursuant to at least FED. R. CIV. P. 69 and TEX. R. CIV. P. 621a.

1. YETI is Entitled to a Permanent Injunction

YETI is entitled to a permanent injunction because Kuer is a willful infringer, is in default, and YETI has no adequate remedy at law. *See, e.g.,* 15 U.S.C. § 1116; 35 U.S.C. § 283;

FED. R. CIV. P. 65(d); TEX. BUS. & COM. CODE § 16.103. In granting permanent injunctive relief to prevailing plaintiffs, district courts consider: (1) whether the plaintiff will suffer irreparable injury absent an injunction; (2) whether remedies at law are inadequate; (3) the balance of hardships between plaintiff and defendant; and (4) whether the public interest would be disserved by an injunction. *See, e.g., eBay Inc. v. MercExchange, L.L.C.,* 547 U.S. 388, 391 (2006). All of these factors favor granting a permanent injunction.

First, Kuer is causing YETI irreparable harm by eroding and devaluing YETI's intellectual property rights by undermining YETI's control over products bearing YETI's proprietary designs. Loss of control over proprietary intellectual property rights constitutes a well-recognized form of irreparable harm and supports issuance of injunctive relief. *See, e.g., Pathway*, 2016 WL 1059536, at *4 ("[T]here is a substantial threat that Plaintiff will suffer irreparable harm without an injunction" based on defendants' use of plaintiff's marks); *Christus Health*, 2014 WL 1092096, at *9 (harm to plaintiffs' reputation and goodwill flowing from defendants' unauthorized use of trademarks is irreparable); *Mary Kay, Inc. v. Weber*, 661 F.Supp.2d 632, 640 (N.D. Tex. 2009) (agreeing that "a likelihood of confusion can constitute irreparable harm in a trademark case" and "if one trademark user cannot control the quality of the unauthorized user's goods and services, he can suffer irreparable harm … Mary Kay will suffer irreparable harm if an injunction is not entered, as it will lose the ability to control the company image"); *Innovative Office*, 2012 WL 1466512, at *4 (allegation of patent infringement, which "must be taken as true" upon default, and failure to appear show irreparable harm to plaintiff). Thus, YETI is suffering irreparable injury because Kuer's actions undermine YETI's control over products bearing YETI's proprietary designs.

Second, remedies at law are inadequate here. Money damages will never adequately compensate YETI because the very essence of YETI's trade dress rights is to exclude others from using a similar design, and, similarly, the very essence of Plaintiff's patent rights is to preserve its right to exclude others from using YETI's inventions. *See, e.g.,* 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:14 (4th ed.); *Retractable Techs. v. Occupational & Med. Innovs., Ltd.*, No. 08-120, 2010 WL 3199624, at *4-5 (E.D. Tex. Aug. 11, 2010) (harm from patent infringement of competitor and possibility that infringer may not be able to pay monetary damages shows monetary damages are inadequate[3]); *Mary Kay*, 661 F.Supp.2d at 640 (agreeing that "damage to goodwill and brand name is not easily quantified" and finding this factor weighed in favor of injunction because, without injunctive relief, the trademark holder would be "powerless to control its company image").

Third, the balance of hardships favors issuing a permanent injunction. The value of YETI's intellectual property rights erodes with any unauthorized uses, as described above. YETI's reputation as a producer of high quality drinkware and coolers who protects its rights will be harmed if Kuer ever markets and sells Infringing Products, because YETI will be precluded from enforcing its intellectual property rights and stanching the sale of sub-par, knock-off products.

On the other hand, compliance with the injunction will not genuinely harm Kuer, but will simply ensure it respects the law and a competitor's intellectual property rights, just as YETI and many other cooler and drinkware competitors must do. *See, e.g., Mary Kay*, 661 F.Supp.2d at 640 ("Mary Kay will suffer irreparable harm if an injunction is not entered, as it will lose the ability to control the company image. On the other hand, a permanent injunction will only

[3] Similarly, Kuer may never be able to fully satisfy the appropriate monetary remedies given that it allegedly has gone out of business and has apparently failed to fulfill many customer orders, or provide refunds to these customers. (*See, e.g.,* van Es Decl. at ¶ 11, Ex. 21).

require the defendants to bring their business into line with the requirements of the law. Thus, this factor favors entry of an injunction, as well."). Moreover, the Court should not speculate on any other "harm" that Kuer could possibly suffer as a result of a permanent injunction, because Defendant is a willful infringer who has not responded to YETI's Complaint. Indeed, any "harm" Kuer could purport to suffer as a result of an injunction was self-inflicted. *See, e.g., Christus Health*, 2014 WL 1092096, at *9 ("[B]ecause Defendants' use of the mark is malicious, the balance of hardships weighs entirely in favor of granting Plaintiffs injunctive relief."); *Retractable*, 2010 WL 3199624, at *5 ("[O]ne who elects to build a business on a product found to infringe [a patent] cannot be heard to complain if an injunction against continuing infringement destroys the business so elected.") (citation and quotation omitted). In view of the undeniable harm to YETI and no recognizable harm to Kuer, this factor also weighs heavily in favor of granting a permanent injunction.

Finally, the public interest also favors the issuance of the permanent injunction requested by YETI. It is a "black letter statement of law and public policy" that "the public interest is served by protecting trademarks." *Amicus Comms., L.P. v. Hewlett-Packard Co., Inc.*, No. 98-1176, 1999 WL 495921, at *20 (W.D. Tex. June 11, 1999). Here, an injunction not only protects YETI's interest in maintaining control over its trademarks and avoiding injury to its reputation and goodwill, but it also protects the public from consumer confusion:

> [T]he court finds that it serves the public interest for Mary Kay to be able to protect its public image. The Supreme Court has held that the Lanham Act exists to insure that the owner of a trademark reaps the benefits of the goodwill of his business, *and* "to protect the ability of consumers to distinguish among competing producers." *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.,* 469 U.S. 189, 198, 105 S.Ct. 658, 83 L.Ed.2d 582 (1985). Thus, the court finds that it is in the interest of the public that there be no confusion between the defendants and Mary Kay. This factor weighs in favor of granting an injunction.

Mary Kay 661 F.Supp.2d at 640. *See also Christus Health*, 2014 WL 1092096, *9 (holding the "public interest will best be served" through an injunction that will avoid "ambiguity" regarding defendants' products based on their trademark use).

Similarly, public policy favors protection of the rights secured by valid patents, including the right to prevent infringement through injunctive relief. *See, e.g., Retractable*, 2010 WL 3199624, at *5 ("[I]t is in the public interest to enforce patent rights and encourage innovation"); *Gillette*, 2016 WL 3745764, at *3 ("The public has a strong interest in maintaining the integrity of patents by enjoining patent infringement.").

Moreover, enjoining Kuer's infringing and diluting activities will not harm the public. There are many other cooler and drinkware products on the market and the public will still be able to purchase those other non-infringing products, despite an injunction against Kuer, and Kuer will still be free to sell non-infringing versions of these products if desired. *See, e.g., MGM Well Servs. v. Mega Lift Sys., LLC*, 505 F.Supp.2d 359, 379 (S.D. Tex. 2007) (granting injunction on infringing products and holding public interest would not be disserved when defendant was still free to market its non-infringing alternative products). Thus, the public interest favors an injunction.

Finally, while Kuer now professes to be out of business, this does not weigh against an injunction because, even if Kuer has truly ceased its infringements, without an injunction Kuer would be free to resume its wrongful activities. *See, e.g., Mass Engineered Design, Inc. v. Ergotron, Inc*., 631 F.Supp.2d 361, 394 (E.D. Tex. 2009) (granting permanent injunction and finding the argument that "there is no need for an injunction because [the Defendant] has stopped selling the infringing products … is contrary to the law. The fact that the defendant has stopped infringing is generally not a reason for denying an injunction against future infringement unless the evidence is very persuasive that further infringement will not take place.") (quotation and citation omitted).

In sum, because all four relevant factors heavily favor YETI, this Court should grant YETI a permanent injunction.

2. YETI is Entitled to Recover Monetary Remedies from Kuer in an Amount to be Determined

As the record in this case and the discussion above make clear, Kuer has willfully infringed and diluted YETI's intellectual property rights. YETI does not have sufficient evidence to fully ascertain the scope of the harm to YETI or particularize a request for an award of monetary remedies at this time, but YETI is entitled to an award of, at least, Kuer's profits and YETI's damages to compensate YETI for Kuer's willful infringements and dilutions under the Lanham Act, the Patent Act, and the relevant Texas statutes, because Defendant's willful violations are plainly established. *See, e.g.,* 15 U.S.C. § 1117; 35 U.S.C. § 284; TEX. BUS. & COM. CODE §§ 16.103 and 16.104. Moreover, YETI's award based on Kuer's unauthorized use of the YETI Trade Dress and unauthorized infringement of the patents should be trebled in view of Kuer's willful and intentional violations. *See* 15 U.S.C. § 1117; 35 U.S.C. § 284; TEX. BUS. & COM. CODE §§ 16.103 and 16.104.

Thus, YETI respectfully requests that this Court award YETI the amount of Kuer's profits and YETI's damages flowing from all sales of Infringing Products covered by this judgment, in an amount to be determined when YETI is able to later enforce the judgment. *See, e.g.,* TEX. CIV. PRAC. & REM. CODE § 34.001 (judgment lives for ten years after entry and plaintiff may seek a writ of execution during this time); FED. R. CIV. P. 69 (post-judgment discovery and enforcement accord with state procedures where court is located).

To that end, as set forth in the accompanying proposed judgment, YETI respectfully requests that the Court retain jurisdiction over the parties and this action to calculate the amount of the monetary remedies, and that, as explained below, the Court also order Kuer and its believed principal to provide post-judgment discovery to YETI.

3. YETI is Entitled to Post-Judgment Discovery

YETI is also entitled to post-judgment discovery to help ascertain and remedy the harm to YETI, including discovery allowing YETI to quantify its damages and Kuer's profits from the Infringing Products. The Federal Rules of Civil Procedure provide that "[i]n aid of the judgment or execution" a judgment creditor "may obtain discovery from" the judgment debtor "as provided in these rules or by the procedure of the state where the court is located." FED. R. CIV. P. 69; *see also British Int'l Ins. Co., Ltd. v. Seguros La Republica, S.A.*, 200 F.R.D. 586, 593 (W.D. Tex. 2000) (Rule 69 "allows post-judgment discovery to proceed according to the federal rules governing pre-trial discovery, or according to state practice."). Likewise, The Texas Civil Procedure Rules provide that a "successful party may, for the purpose of obtaining information to aid in the enforcement of such judgment, initiate and maintain in the trial court in the same suit in which said judgment was rendered any discovery proceeding authorized by these rules for pre-trial matters." TEX. R. CIV. P. 621a.

Thus, YETI is entitled to seek a broad scope of discovery from Kuer. *See* TEX. R. CIV. P. 190.6 (typical limitations on discovery do not apply to discovery under Rule 621a); *Collier v. Salinas*, 812 S.W.2d 372, 376 (Tex. App.–Corpus Christi 1991, orig. proceeding) (scope of post-judgment discovery covers anything "reasonably calculated to lead to the discovery of information that would aid in the enforcement of the judgment"); *In re Amaya*, 34 S.W.3d 354, 358 (Tex. App.–Waco 2001, orig. proceeding) ("[a]nything that could assist in locating [the creditor] or his assets is relevant" and proper subject of post-judgment discovery, and creditor is "entitled to engage in discovery reasonably calculated to lead to the discovery of assets from which to satisfy the judgments"); *British Int'l*, 200 F.R.D. at 589 (stating the "scope of post-judgment discovery is broad" and recognizing discovery provisions of Federal Rules afford right to "obtain information pertinent to the pending controversy" in both pre-trial and post-judgment scenarios). YETI is also entitled to seek discovery from third parties who possess relevant information. *See, e.g., In re Amaya*, 34 S.W.3d at 358-359 (granting writ of mandamus vacating quashing of deposition and document requests directed to third party individual that was related to judgment creditor); *British Int'l*, 200 F.R.D. at 590-96 (granting motion to compel post-judgment discovery from third parties). *See also, e.g.,* FED. R. CIV. P. 30 (allowing deposition of "any person"); FED. R. CIV. P. 45 (allowing document production and deposition of third parties).

Here, YETI seeks discovery on a subset of topics that relate to the harm Kuer and the Infringing Products have caused YETI, or otherwise relate to Kuer's ability to satisfy the judgment. Specifically, YETI requests that the Court, as reflected in the accompanying proposed judgment, order the production of documents and deposition appearances for Kuer and its believed principal, Antonio F. Guerrero.

Federal Rule of Civil Procedure 34 and Texas Rule of Civil Procedure 192.1(b) authorize a party to seek production of documents. *See also* TEX. R. CIV. P. 192.3(b) ("party may obtain discovery of the … contents of documents and tangible things"). Federal Rule 30 provides for the deposition of individuals and designated representatives of a corporation, and Texas Rule 192.1(f) also allows oral depositions. Thus, YETI is entitled to seek discovery via these mechanisms on topics reflected in the accompanying proposed judgment and discussed below.

As the defaulting party in this litigation, Kuer is unquestionably an appropriate target for post-judgment discovery. And given Kuer's sustained efforts to evade its obligations to this Court and this lawsuit, YETI also seeks post-judgment discovery from its believed principal, Antonio F. Guerrero. Kuer appears to have made significant efforts to hide the identity of individuals that are substantively involved with the company, but, on information and belief, YETI believes the principal of Kuer was/is Mr. Guerrero. (*See* van Es Decl. at ¶¶ 8-10, Exs. 16-20). Thus, YETI seeks document production from Kuer and Mr. Guerrero, along with a 30(b)(6) deposition of Kuer as well as a personal deposition for Mr. Guerrero.

YETI is entitled to seek information on a broad scope of information, but only seeks discovery on a subset of topics that relate to the harm Kuer and the Infringing Products have caused YETI. Specifically, YETI is seeking information regarding (i) Kuer's sales and marketing, as well as consumer confusion or associations based on Kuer's unlawful activities, so that YETI can attempt to quantify the harm and damage to YETI, as well as the scope of Kuer's ill-gotten profits, (ii) information regarding Kuer's business operations, such as its manufacturer(s), importer(s), and distributor(s), that will assist YETI in ensuring compliance with the final judgment in this matter and in preventing future infringements, and (iii) information related to Kuer's assets that will assist YETI in enforcing the judgment.

Thus, this Court should Order post-judgment document production and deposition appearances for Kuer and Mr. Guerrero, as reflected in the accompanying proposed judgment, which YETI will serve on these parties after entry by the Court.

4. YETI is Entitled to Recover its Reasonable Attorneys' Fees and Costs

YETI respectfully requests an award of its reasonable attorneys' fees and costs because Kuer is a willful infringer, making this an exceptional case under at least 15 U.S.C. § 1117(a), 35 U.S.C. § 285, and Rule 54(d) of the Federal Rules of Civil Procedure. *See Pathway,* 2016 WL 1059536, at *5 (entering award of attorneys' fees upon grant of default judgment against willful trademark infringer); *Gillette*, 2016 WL 3745764, at *4 ("[W]illful patent infringement [] merits an award of fees," as does failure to appear in action). *See also* TEX. BUS. & COM. CODE §§ 16.103 and 16.104.

YETI is also entitled to its reasonable costs in this case. Costs are awarded as a matter of course to the prevailing party unless the court otherwise directs. FED. R. CIV. P. 54 (d). What's more, the Lanham Act provides that a plaintiff in an infringement action can recover the cost of the action. 15 U.S.C. §1117. *See also Christus Health*, 2014 WL 1092096, at *8 (awarding costs after default judgment on Lanham Act claim).

Thus, this Court should enter a final judgment by default that includes an award of YETI's reasonable attorneys' fees and costs. Upon entry of the final judgment by default, YETI may file a claim for attorneys' fees pursuant to Local Rule CV-7(j).

IV. CONCLUSION

For the reasons set forth above, YETI requests that this Court grant YETI's Motion for Judgment by Default against Kuer, and enter the proposed Final Judgment attached hereto.

Dated: October 27, 2016

Respectfully submitted,

By: */s/* Sean J. Jungels

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ATTORNEYS FOR PLAINTIFF YETI COOLERS, LLC

CERTIFICATE OF SERVICE

I hereby certify on October 27, 2016, a true and correct copy of the foregoing Motion and any associated documents are being served by electronic mail on the following email address of Defendant, Kuer Outdoors, LLC, and further served by first-class mail, postage prepaid, on the following registered agent of Defendant, Kuer Outdoors, LLC:

By Email:

kuercoolers@gmail.com

By Mail:

Kuer Outdoors, LLC
c/o Agents & Corporations. Inc.,
1201 Orange Street
Wilmington, DE 19801

/s/ Sean J. Jungels
FOR YETI COOLERS, LLC